

SECURITIES COMMISSION

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v.

LEE KEE SIEN, ALBERT & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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NALLINI PATHMANATHAN JC

[SUIT NO: D7-22-805-2007]

6 FEBRUARY 2009

CIVIL PROCEDURE: *Mareva injunction - Application for - Inter partes application to prevent third defendant from removing, disposing or dealing with assets in his name or up to a value of US\$83 million - Whether affidavit evidence admissible - Whether plaintiff made out a good and arguable case against third defendant - Whether injunction would serve to preclude funds from being dissipated*

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CIVIL PROCEDURE: *Inter partes application - Affidavit evidence - Whether admissible - Whether provisions of Evidence Act 1950 apply to affidavit evidence in course of interlocutory civil proceedings*

This was the plaintiff's *inter partes* application (encl. 3) under s. 100 of the Securities Industry Act 1983 and/or O. 29 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court for a Mareva injunction against the third defendant, one Amir Hassan ('Amir') to prevent him from, *inter alia*, (i) removing from Malaysia assets in Malaysia *albeit* in his name or otherwise and whether solely or jointly owned up to a value of US\$83 million; (ii) disposing or dealing with his assets whether in or outside Malaysia, whether in his own name or not up to a value of US\$83 million, or otherwise diminishing their value; (iii) a series of other reliefs designed to make Amir provide full disclosure of any and or all monies that have been forwarded by investors to accounts set up by him or jointly with any of the other defendants. Briefly, the plaintiff contended that the third defendant was involved in an investment scheme 'scam' which was offered through the internet called 'Swisscash' which could be located at several different website addresses. As a consequence of investigations undertaken by the plaintiff ('SC'), it was discovered that Swisscash operated by soliciting the investment of public funds in it, through the medium of the internet. The Malaysian public was targeted for such investments, and the returns from the investment in Swisscash here held out to extend up to 300% within 15 months of investment. These monies invested by the

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- A Malaysian public, and therefore belonging to them in equity, were also channeled by Amir, one Albert (first defendant) and one Kelvin (second defendant) into Amir's account at HSBC Hong Kong and from Hong Kong into Albert's personal account in HSBC Bank Hong Kong. These matters were fully set out in the affidavit of Nortarmizi Arshad. Amir strenuously opposed the grant of an interim Mareva injunction until the disposal of the trial of this action. He argued that the injunction should not be allowed to continue for the following reasons (i) the statements made by Nortamizi, the deponent of the affidavits for the plaintiff, could not be considered by the court as comprising evidence to show that Amir was involved in Swisscash on the grounds that it was hearsay evidence and that the provisions of the Evidence Act 1950 precluded the use of this evidence in support of this application; (ii) there was no good arguable case made out by the SC against Amir and (ii) there existed no real or serious risk of dissipation.

Held (granting order in terms of encl. 3):

- E (1) The provisions of the Evidence Act 1950 do not apply to affidavit evidence in the course of interlocutory civil proceedings. It was therefore incorrect, in an interlocutory application for an injunction; to invoke the various provisions of the Evidence Act 1950 including s. 90A and object to affidavit testimony on the grounds that it was hearsay. The deponent of the affidavits for the plaintiff was Nortamizi, who, as the investigating officer of the Swisscash scam was directly involved in the investigation of this matter. Further, Nortamizi's evidence relating to Amir's involvement was direct evidence which he claimed he procured directly from Amir himself. A perusal of the entirety of the affidavits filed in respect of this application showed that the plaintiff had made out a good arguable case against, *inter alia*, the third defendant. (paras 15, 16 & 18)
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- H (2) For the purposes of the grant of an interim injunction, the documents and exhibits produced were available for the court to consider when adjudicating on the application. They showed a clear case of attempts to solicit the Malaysian public to invest in a scheme which did not exist and which was unlicensed under the relevant securities laws. Amir, equally clearly, by his own statements appeared to be involved in the Swisscash scheme. The evidence set out above, particularly
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the copies of bank statements showing numerous and large deposit activities in Amir's HSBC Hong Kong account demonstrate that numerous investors were 'buying' into the Swisscash scam at, *inter alia*, his behest. His denials, in the face of the exhibit evidence in the several affidavits filed in support of the application, appeared untenable. Excerpts taken from his own personal computers at his residence and office further fortified the evidence by showing records of Swisscash investors etc. There was clearly an arguable case made out by the plaintiff. (paras 20 & 21)

- (3) The injunction sought was to capture all monies which may come to light before and during the trial of this matter. These monies were essentially monies held on trust for those investors who invested in Swisscash and need to be protected. It was evident from the submissions of Amir's counsel, to the effect that further accounts have been located in his name recently, that not all the accounts held in his name have been discovered as yet. As such it was entirely possible that further accounts in his name may be found from time to time pending disposal of the trial of this action. An injunction would serve to preclude these funds from being dissipated in any manner pending the trial of this matter. In any event the Anti Money Laundering And Anti Terrorism Financing Act 2001 (AMLA) orders have a definite life span and require renewal from time to time. There was therefore a possibility that some orders may not be renewed, inadvertently. The Mareva order served to safeguard against any such possibility as it would remain in place until the trial of this action was over, thereby safeguarding the assets of Malaysian investors whose monies have been placed in these accounts. In the event the injunction was lifted, there was a serious risk that monies belonging to third parties may be moved out or shifted by Amir. (para 27)

Case(s) referred to:

- Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 (*refd*)
Datuk Bandar Kuala Lumpur v. Zain Azhari Zainal Abidin [1997] 2 CLJ 248 CA (*refd*)
Third Chandris Shipping Corporation And Others v. Unimarine SA [1979] 2 All ER 972 (*refd*)

A Legislation referred to:

Evidence Act 1950, s. 90A

Rules of the High Court 1980, O. 29, O. 41 r. 5(2)

Securities Industry Act 1983, ss. 14, 15A, 100

For the plaintiff - Tommy Thomas; M/s Tommy Thomas

B *For the 3rd defendant - Rosli Kamaruddin; M/s Rosli Kamaruddin & Co*

Reported by Suhainah Wahiduddin

JUDGMENT

C Nallini Pathmanathan JC:

Enclosure 3

D [1] Enclosure 3 is the plaintiff's *inter partes* application under s. 100 of the Securities Industry Act 1983 and/or O. 29 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court for a Mareva injunction against the third defendant, Amir bin Hassan ('Amir') to prevent him from, *inter alia*:

E (a) removing from Malaysia assets in Malaysia *albeit* in his name or otherwise and whether solely or jointly owned up to a value of US\$83 million;

F (b) disposing or dealing with his assets whether in or outside Malaysia, whether in his own name or not up to a value of US\$83 million, or otherwise diminishing their value;

G (c) A series of other reliefs designed to make Amir provide full disclosure of any and or all monies that have been forwarded by investors to accounts set up by him or jointly with any of the other defendants.

Outline Facts

H [2] The salient facts relating to this matter are comprehensively set out in the submissions filed by the plaintiff at paras 2(i)-(vi) of the plaintiff's written submissions. I do not intend to reproduce those facts here. In brief, the plaintiff contends that the 3rd defendant is involved in an investment scheme 'scam' which was offered through the internet called "Swisscash", which could be located at several different website addresses. As a consequence
I of investigations undertaken by the plaintiff ('SC') with assistance from its international counterparts, the SC discovered, *inter alia*, that Swisscash claimed to be a sector of the business of the 5th

defendant which had allegedly been set up in 1948 in Berne, Switzerland for 48 years before shifting to The Commonwealth of Dominica in 1996. This fund allegedly invested in and held itself out as investing in offshore development projects, hedging, equity, high yield investments, commodities and foreign exchange.

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[3] Swisscash operated by soliciting the investment of public funds in it, through the medium of the internet. The Malaysian public was targeted for such investments, and the returns from investment in Swisscash were held out to extend to up to 300% within 15 months of investment. These matters are more fully set out in the affidavit of Nortarmizi bin Arshad affirmed on 18 June 2007.

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[4] The masterminds behind Swisscash were found to be the first defendant, Lee Kee Sien, Albert ('Albert') and the second defendant, Choo Mun Hoe, Kelvin ('Kelvin') who together with Amir and the other defendants in this suit, utilized the Swisscash scheme to invite investments from the world at large, when in fact no such legitimate fund existed. The funds which were solicited and received with the promise of such high returns were channeled into accounts operated by Amir and the 4th to 6th defendants, with accounts in Jersey, Channel Islands and Hong Kong. Albert is the alter ego of the 4th defendant, the 6th defendant and the 7th defendant.

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[5] These monies invested by the Malaysian public, and therefore belonging to them in equity, were also channeled by Amir, Albert and Kelvin into Amir's account at HSBC Hong Kong and from Hong Kong into Albert's personal account in HSBC Bank Hong Kong.

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[6] The basis for the SC contending that the whole scheme is a fraud or scam includes the following factors:

- (i) As stated before, no such legitimate fund as Swisscash exists;
- (ii) None of the defendants are licensed or approved by the SC to carry out any fund management activities in Malaysia. This is in breach of s. 15A of the Securities Industry Act 1983 ('SIA')
- (iii) Amir is neither licensed nor approved by the SC to act or hold himself out as an investment advisor in Malaysia. By so acting, he appears to have breached s. 14 of the SIA;

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- A (iv) The defendants working together, utilized an unregulated company which existed only on paper and on websites to solicit and induce, *inter alia*, the Malaysian public to send their monies to accounts as described previously, on the pretext that these investors would enjoy extraordinarily high profits as a result of investing in Swisscash;
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- (v) There is no evidence shown anywhere that these monies were so invested and that high returns were accorded to the investors. Instead these monies, which are in law, trust monies belonging to the public who invested in Swisscash, were channeled by the defendants, including Amir into Amir's account at HSBC Hong Kong and/or from Albert's Hong Kong Account into Albert's personal account in HSBC Hong Kong;
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- D (vi) The fact that Swisscash is a scam, the plaintiff claims, is evidenced by the matters set out in the affidavit of Nortarmizi dated 18 June 2007, including the fact that the set up of Swisscash's New York office was a sham in that it was merely a virtual office with forwarding services provided by an "executive office". All mail addressed to Swisscash was forwarded to Albert's office in Petaling Jaya, which was also the business address of the 4th defendant;
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- F (vii) Amir's involvement in the scam appears from the affidavit evidence filed thus far, namely that he actively promoted Swisscash through his blog known as 'www.dreamkaya.biz', and thereby soliciting from the public, cash allegedly for the purposes of investment in Swisscash with the promise of high returns, (see para 23 of Nortarmizi's affidavit of 18 June 2007). The monies were wired or transferred into accounts operated by, *inter alia*, Amir. This fact is evidenced by an e-mail from one Mr. Boucher to the Securities and Futures Commission of HK informing the authority that Swisscash's instructions were to deposit transactions in Amir's account.
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- H There is also a letter from a Mr. Wakefield confirming that his company had invested US\$10,000 in Swisscash by transferring that sum to Amir's account. The statements on Amir's HSBC Hong Kong account show a mass of deposits as at 11 April 2007 totalling HK\$15,989,073.96. (See para 35 of Nortarmizi's affidavit of 18 June 2007). Finally Amir himself discloses in his affidavit affirmed on 24 July 2007 that
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as of 16 July 2007 the amounts deposited in his HSBC account in Hong Kong amounted to: HK\$36,255,426.53; EUR850; GBP 10,027.32; and US\$3,693,604.15.

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- (viii) In soliciting funds for Swisscash, the defendants, including Amir appear to have made or published statements and promises to investors which are less than accurate, and misleading given the extravagant nature of the returns of investments promised;

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- (ix) The acceptance of investments from Malaysian investors may also amount to a breach of the provisions of the Anti-Money Laundering And Anti-Terrorism Financing Act 2001 ('AMLA');

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- (x) A raid conducted on Amir's office and residential premises by a team of personnel from the SC resulted in the confiscation, *inter alia*, of three portable computers and one personal computer from Amir's residence and one personal computer from his office. The contents of the computers revealed lists of Swisscash investors who had transferred their investment funds into Amir's account at HSBC Hong Kong;

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- (xi) A powerpoint presentation found on the computer shows Amir and Albert and new prospects being shown the Swisscash scene. Amir appears to have been actively promoting Swisscash;

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- (xii) Powerpoint presentation slides of Amir's, show Swisscash investment returns credited into his personal bank accounts in May bank, Public Bank and DBS Bank Singapore.

Amir's Opposition Of Enclosure 3

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[7] Amir strenuously opposes the grant of an interim Mareva injunction on terms as set out in encl. 3 until the disposal of the trial of this action. He argues that the injunction should not be allowed to continue for the following reasons:

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- (i) There exists no real or serious risk of dissipation; and
- (ii) There is no good arguable case made out by the SC against Amir.

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A Not Involved In The Swisscash Scam

[8] Amir submits that he is very much a victim of the scheme promulgated by Albert whom he first met in 2003. Albert, according to Amir, manipulated him to further his own financial and personal interests.

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[9] To that extent Amir denies that he was promoting, soliciting and diverting the investment fund for the sum of US\$83 million in the Swisscash Investment scheme. In this context, he maintains that the contentions in the affidavit of Nortarmizi at para 23 of his first affidavit are inadmissible in evidence against him in this application.

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No Control Over Bank Accounts Held In His Name

D [10] Secondly Amir states that he does not have full control to give instructions or to make withdrawals from the bank accounts in his name.

[11] Amir also denies holding himself out as a fund manager or investment advisor in contravention of the provisions of ss. 14 and 15 of the SIA. All his personal assets and belongings, he maintains are legally obtained.

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Bank Accounts Have Already Been Frozen Under AMLA – Mareva Is Redundant

F [12] Thirdly, Amir maintains that the plaintiff has already used the provisions of AMLA to ‘freeze’ the accounts held in his name. The requirement for a Mareva is therefore redundant, he submits.

G Monies Safely Held In A Stakeholder Account – No Risk Of Dissipation Of Assets

[13] Fourthly, Amir submits that there is no longer a need for a Mareva as the monies held outside the jurisdiction have been placed in a stakeholder’s account with Messrs. Shearman & Delamore. The other accounts have been frozen under the AMLA provisions. Why the need for a Mareva, he questions?

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[14] Amir stresses that the plaintiff has failed to show any real or serious risk of dissipation of assets warranting the grant of a Mareva injunctions.

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Analysis

Has The Plaintiff Made Out A Good Arguable Case?

[15] A perusal of the entirety of the affidavits filed in respect of this application shows that the plaintiff has made out a good arguable case against, *inter alia*, the 3rd defendant. At para 23 of Nortarmizi's affidavit in support of the plaintiff's case (dated 18 June 2007), the deponent of the affidavit who is an investigating officer with the plaintiff deposes to the fact that he personally interviewed Amir and that Amir personally confirmed to him the following salient facts:

- (i) Amir is the founder and operator of the www.dreamkaya.biz blog;
- (ii) The said blog promotes Swisscash;
- (iii) He had solicited and channeled investments amounting to US\$3 million into the SwissCash scheme;
- (iv) He had known the 1st defendant, Albert since 2003;
- (v) Exhibits are shown of print-outs from Amir's blog as well as a brochure, promoting Swisscash.

[16] Amir contends that these statements by Nortarmizi cannot be considered by the court as comprising evidence to show that he is involved in Swisscash, on the grounds that this is hearsay evidence and that the provisions of the Evidence Act 1950 preclude the use of this evidence in support of this application. He maintains that all information procured from the internet, information from the US Securities & Exchange Commission relating to the New York office of Swiss Mutual Fund, information from the dreamkaya website, information from the Securities Commission of Hong Kong and e-mails from investors are hearsay and should therefore be disregarded. He relies on the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248 in support of his contention where Gopal Sri Ram JCA stated in the context of an application for judicial review that an affidavit filed by a decision maker to rebut an allegation that a decision was made on an erroneous basis, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. An affidavit by a deponent who has no personal knowledge of the consideration upon which the decision was based is pure hearsay and is worthless as evidence.

- A [17] It is trite that the provisions of the Evidence Act 1950 do not apply to affidavit evidence in the course of interlocutory civil proceedings. It is therefore incorrect, in an interlocutory application for an injunction; to invoke the various provisions of the Evidence Act 1950 including s. 90A and object to affidavit
- B testimony on the grounds that it is hearsay.

- C [18] In the instant case, the deponent of the affidavits for the plaintiff is Nortarmizi who, as the investigating officer of the Swisscash scam is directly involved in the investigation of this matter. Further, Nortarmizi's evidence relating to Amir's involvement is direct evidence which he claims he procured directly from Amir himself. This is unlike the situation envisaged in the *Datuk Bandar* case, as Nortarmizi has direct knowledge of the investigation himself and has not made any other officer
- D unconnected with this investigation, depose the affidavit before the court.

- E [19] The relevant provisions for the use of affidavit evidence in interlocutory proceedings is set out in O. 41 r. 5 sub-rule 2 which provides:

An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

- F [20] In the instant case, Nortarmizi has deposed to the salient facts set out above either on the basis of his personal knowledge or on the basis of documents which he has exhibited for the court to inspect, or with reference to the sources of his information. In like manner letters from the New York Securities and Exchange
- G Commission and the Hong Kong counterpart of the plaintiff may be perused and considered at this stage of the proceedings, as these are interlocutory proceedings. At trial, it may well be necessary to procure the attendance of witnesses so as to enable Amir to cross-examine these witnesses. But for the purposes of
- H the grant of an interim injunction, the documents and exhibits produced are available for the court to consider when adjudicating on the application.

- I [21] When these salient facts and exhibits as outlined previously are examined, they show a clear case of attempts to solicit the Malaysian public to invest in a scheme which does not exist and which is unlicensed under the relevant securities laws. Amir, equally clearly, by his own statements appears to be involved in

the Swisscash scheme. The evidence set out above, particularly the copies of bank statements showing numerous and large deposit activities in Amir's HSBC Hong Kong account demonstrate that numerous investors were 'buying' into the Swisscash scam at, *inter alia*, his behest. His denials, in the face of the exhibit evidence in the several affidavits filed in support of the application, appear untenable. Excerpts taken from his own personal computers at his residence and office further fortify the evidence by showing records of Swisscash investors etc. The extent of the investments in Swisscash as evidenced by his own statement to Nortarmizi (see para 23) amounts, in his estimation, to US\$83 million. There is clearly an arguable case made out by the plaintiff.

Has The Plaintiff Shown That There Is A Serious Risk Of Dissipation Of Assets?

[22] On this front, as set out above, Amir maintains that he has complied with all orders so far, has brought in all monies within and outside the jurisdiction and placed them in a stakeholder's account. Finally he contends that all his accounts are the subject of AMLA or 'freezing' orders and therefore there is no risk of dissipation of assets.

[23] The plaintiff submits however that there is a serious risk of dissipation, as if the existing ad interim injunction is lifted, there is a serious risk that Amir, being the customer and account holder of, for instance, his HSBC account, would still be able to instruct the bank to move funds in the account.

[24] More importantly at the outset of the hearing of this application, counsel for Amir, informed the court, undertaking to provide this information vide affidavit, that several other accounts in Amir's name had been found within jurisdiction other than the RM11 million deposited in the stakeholder's account. He undertook to ensure that Amir filed an affidavit disclosing the accounts and the amounts within a period of one month.

[25] The point to be emphasized however, is that the injunction sought is not only in respect of the RM11 million which appears to be safely deposited with a third party, but also to capture all other monies which may come to light before and during the trial of this matter. These monies are essentially monies held on trust for those investors who invested in Swisscash and need to be protected.

- A [26] With respect to Amir's contention that he has no control over these accounts as stated in his affidavit, this fails to explain how he managed, without such control, to consent to, and in fact transfer the funds in his accounts abroad into the independent stakeholder's account within jurisdiction. In short, his contention
- B that he has no control over these accounts appears untenable.

- C [27] As for his contention that many, if not all the accounts in his name are the subject of AMLA or 'freezing' orders, it is evident from the submissions of his counsel on 30 January 2009, to the effect that further accounts have been located in his name recently, that not all the accounts held in his name have been discovered as yet. As such it is entirely possible that further accounts in his name may be found from time to time pending disposal of the trial of this action. An injunction would serve to
- D preclude these funds from being dissipated in any manner pending the trial of this matter.

- E [28] In any event AMLA orders have a definite life span and require renewal from time to time. There is therefore a possibility that some orders may not be renewed, inadvertently. The Mareva order serves to safeguard against any such possibility as it would remain in place until the trial of this action is over, thereby safeguarding the assets of Malaysian investors whose monies have been placed in these accounts.

- F [29] In summary, I conclude that in the event the injunction is lifted, there is a serious risk that monies belonging to third parties may be moved out or shifted by Amir.

- G [30] Having considered the totality of the evidence in line with *Third Chandris Shipping Corporation And Others v. Unimarine SA* [1979] 2 All ER 972 as well as *Aspatra Sdn. Bhd. & Ors. v. Bank Bumiputra Malaysia Bhd. & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50, I am satisfied on the evidence produced before me that the plaintiff has shown that it has a good arguable case, that Amir
- H has assets within the jurisdiction as well as outside the jurisdiction and that there is a risk of these assets being removed if the existing injunction is lifted, before trial of this action. Accordingly an order in terms of encl. 3 is granted.

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